(1)

FILED

No. 031708 MAY - 4 2004

In The

Supreme Court of the United States
October 2003 Term

MARCUS D. McANALLY, JR.

Petitioner

v

CLARK COUNTY, a Nevada public entity,
ROBERT WEBER; RON LYNN; GREG FRANKLIN
AND GARY HOUK.

Respondents

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1 Whether the Ninth Circuit Panel Order, affirming a decision of the United States District Court for Nevada and the Panel's subsequent Denial of Petition for Rehearing and Rearing En Banc without oral argument in Ninth Circuit Case Number 02-17160, conflicts with, and has the effect of overturning, prior decisions of the United States Supreme Court, the Ninth Circuit and those of other circuits.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	13
CONCLUSIONS	15
APPENDIX	17
A. DISTRICT COURT OPINION 09/24/02	1a
B. ORDER AFFIRMING DISTRICT COURT OPINION	19a
C. ORDER DENYING REHEARING AND REHEARING *EN BANC* 2/04/04	21a

TABLE OF AUTHORITIES

Cases	Pages
Arnett v. Kennedy, 416 U.S. 134 (1975)	12
Blaylock v Swinden, 862 F. 2d. 1352, 1354 (9th Cir. 1988)	13
Clements v Airport Authority, Washoe County 60 F.3d.321(9th Cir. 1995)	10
Coszalter v City of Salem, Opinion No. 00-36097, (February 18, 2003, 9th Cir.)	10
D'Angelo v Gardner, 819 P.2d.206 (Nev. 1991)	11
Daniels v Williams, 474 U.S. 327 (1986)	10
Devereaux v Abbey, F.3d. 2001, Wl 1008128 (9th Cir. 2001) (en banc)	10
Gutswiller v Fenik, 860 F.2d. 1317, 1318, (6th Cir. 1988)	10
Lebbos v Judges of the Superior Court, Santa Clara County, 833 F.2d. (9th Cir. 1989)	10,13
Lockery v Kayfetz 917 F.2d. 150 (9th Cir. 1991)	10
Marks v City of Chesapeake, 883 F. 2d. 308, 313 (4th Cir. 1989)	10
Mooney v Holohan, 924 U.S. 103 (1935)	13
Nissan Fire v Fritz, Opinion 9816024, April 25, 2000 (9th Cir.2000)	12

Case	Page
O'Conner v Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1986)	8
Ostrofe v H.S. Crocker Co., Inc., 670 F.3d 1378 (9th Cir. 1982)	11
Perry v Sindermann, 408 U.S. 725. (1972)	13
Pyle v Kansas, 317 U.S. 213 (1942)	13
Sierra Lake Reserve v The City of Rocklin, et al., 938 F. 2d.951(9th Cir. 1991)	10,14
Swann v City of Dallas, 922 F.Supp. 1184 (5th Cir. 1996)	10
Thompson v Gallagher, 489 F.2d.443, (5th Cir. 1973)	10
Thurston Motor Lines v Jordan K. Rand, 460 U.S. 533,535 (1983)	10
Village of Willowbrook v Olech, S. Ct. No.98-1288 (February 23, 2000, U.S. Supreme Court	10
Wayment v Holmes, 912 P.2d 816 (Nev. 1996	11
Wong Sun v United States,. 371 US 471, 9 L. Ed. 2d 441 (1963)	8
Statutes and Rules	
42 U.S.C. Section 1983	2,9

Case	Page
Sup. Court Rule 10(1)(c)	1
FRCP Rule 56	11,21a
First Amendment	2
Fourth Amendment	2
Fourteenth Amendment	2
NRS. 197.110 Misconduct of public officer	6
N.R.S. 233.010 Equal rights against discrimination	11
N.R.S. 239.320 Falsifications of Records	7
N.R.S. 281.621. Whistle blower protection	11

PETITION FOR WRIT OF CERTIORARI

Marcus D. McAnally, Jr., the Petitioner, respectfully prays that a writ of certiorari issue to review the orders of the United States Court Appeals for the Ninth Circuit entered in this case on December 12, 203 and on February 4, 2003, respectively.

OPINIONS BELOW

The Order affirming the Order of the District Court (Appendix B hereto) is unreported. The Order denying the petition for panel rehearing and rehearing *en banc* (Appendix C hereto) is unreported.

STATEMENT OF JURISDICTION

The Panel Memorandum of the United States Court of Appeals for the Ninth Circuit (Appendix) affirming the Order of the United States District Court for the District of Nevada was filed December 12, 2003. A timely petition for rehearing and rehearing *en banc* was denied February 4, 2004. The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(1)(c), in that the Ninth Circuit has decided important questions of federal law which should be settled by this Court.

RELEVANT PROVISIONS INVOLVED

Decisions of the Ninth Circuit affirming a Federal District Court Order which effectively overturn precedent decisions of the Ninth Circuit Court of appeals, other Circuits and those of the Supreme Court.

The First Amendment to the Constitution of the United States, free speech and the free exercise thereof without fear of punishment for such proper exercise.

The Fourth and Fourteenth Amendment to the Constitution of the United States, specifically substantive due process denied to a public servant through abuse of the legal system.

STATEMENT OF THE CASE

(I) Nature of the Case

This is a petition for review of the Order of the Ninth Circuit Court of Appeals affirming an Order of a District Court which decided questions of fact, made improper rulings of law and retained jurisdiction based on those findings, over state law questions; and which Order conflicts with, or misapprehends existing case law of the Ninth Circuit, other Circuits and of this Court;

(ii) Proceedings in the District Court

Petitioner filed civil suit in the United States District Court for Nevada predicated on a federal question under 42 U.S.C. Section 1983 against Defendants for wrongful termination depriving him of his property right in his employment and compromising his right to free speech in retaliation for his refusal to violate the laws of the State of Nevada on the orders of Defendants and reporting their abuse and the basis therefore to higher authority. Defendants

fired Petitioner and he was unemployed for five months before the termination was overturned through an arbitration process. A neutral hearing officer at arbitration found a denial of due process by Defendants and also found that the acts with which Defendants fired Petitioner were the routine practices of the department and ordered Petitioner restored to his former position.

Before and after termination and before Petitioner won reinstatement through a union grievance process. Defendants actively pressured the Clark County District Attorney to indict Petitioner on criminal charges allegedly related to his termination. The false charges were dismissed after three and one half years of criminal litigation in the Eighth Judicial District Court, Clark County, Nevada. Prior to dismissal of the criminal charges in the Eighth Judicial District Court, Las Vegas, Clark County, Nevada, oral argument was heard on July 5, 2002 on the Respondent's motions to dismiss and for summary judgment against Petitioner's civil suit in the United States District Court, the Honorable Judge Larry Hicks, presiding. Summary judgment was granted to Defendants on all charges, including charges of deprivations of constitutional rights by Defendants acting under color of state law, for which acts 42 U.S.C. Section 1983 provides a cause of action. Petitioner timely appealed the decision to the Ninth Circuit Court of Appeals, whose affirmation of the reasoning of the District Court is the subject of this petition. Shortly after Judge Hicks entered his written decision granting summary judgment against the Petitioner, all criminal charges in the Nevada state court criminal proceeding were dismissed by that court which found that Petitioner committed no crime and violated no Clark County policy justifying the filing of criminal charges

The record before Judge Hicks was replete with evidence clearly showing genuine issues of material facts, all of which

were decided by Judge Hicks rather than to consign that duty to a jury. As well, the District Court retained jurisdiction over state law questions and dismissed all, with prejudice. It its final Order granting summary judgment on all counts to Defendants, the District Court overlooked or ignored evidence in the record before it which evidenced genuine issues of material fact necessitating a jury trial resolution.

(iii) Proceedings in the Ninth Circuit Court of Appeals

Petitioner filed a timely Appeal to the Ninth Circuit citing *inter alia* the precedent decisions with which the District Court's decision conflicted. The Panel of the Ninth Circuit, found that the case was suitable for decision without oral argument and affirmed, without explanation or findings, the reasoning of the District Court, and further found that the District Court had not abused its discretion in asserting supplemental jurisdiction over Petitioner's state law claims. Appendix, Order of December, 2003.

Petitioner filed a timely petition for rehearing and petition for rehearing *en banc* alleging that the Panel's decision conflicts with and/or misapprehends existing case law of the Ninth Circuit and of the United States Supreme Court. On February 4, 2004, the Panel voted unanimously to deny the petition for rehearing, two judges voted to deny the petition for rehearing *en banc* and no active judge of the full court voted for rehearing *en banc*. Fed. R. App. P.35. Both petitions were denied.

(iv) Statement of Facts

Petitioner was a Supervising Building Inspector in the Clark County, Nevada, Building Department since 1989. Defendants are the Managers of said department and

supervised Petitioner. The Building Department oversees millions of dollars in commercial construction every day and Petitioner had responsibility for most commercial construction on the Las Vegas Strip. Defendants desired money/donations from contractors and developers to support golf tournaments, hospitality rooms at conferences and the like, for a trade organization, the International Conference of Building Officials (ICBO), in which each served, or had served, as officers.

On, or about December, 1997 at a morning supervisor meeting, Defendants directed the supervisors to tell their inspectors, as they went about daily inspections, to solicit money for ICBO, from contractors and other builders. Petitioner refused to do so, stating his belief that such solicitations were immoral, if not illegal under Nevada law, and that contractors would expect something in return for their contributions. Other supervisors then also refused to carry out the order.

The next month, January, 1998, Defendants removed Petitioner from all supervisory functions and assigned his staff of inspectors to another supervisor, the Secretary of the ICBO Golf Tournament Committee, and gave him a clerical job. Petitioner alleged that Defendants constructively terminated him for his refusal to solicit donations and no other explanation is supported by the facts in this case. "Donations" from contractors increased from $26,000 per year, to $135,000 annually, within two years, according to public record documents filed by ICBO with the Internal Revenue Service. Defendants first claimed that they had not ordered employees to solicit money from contractors. Then they said such soliciting was only done by members of the Golf Tournament Committee. That statement to the newspapers and on public television in Las Vegas by Defendants was later modified to claim that employees had not solicited "on county time". Petitioner contends that the

solicitation activities of the Defendant/Respondents violated the following provision of Nevada law, to wit:

Nevada Revised Statute 197.110 Misconduct of public officer. Every person who:

1. Asks or receives, directly or indirectly, any compensation, gratuity or reward, or promise thereof, for omitting or deferring the performance of any official duty or for any official service which has not been actually rendered, except in cases of charges for
2. prospective costs or fees demandable in advance in a case allowed by law; or
3. Employs or uses any person, money, or property under his official control or direction, or in his official custody, for the private benefit or gain for himself or another, is guilty of a Category E felony and shall be punished as provided in NRS 193.130.

In September, 1998, department employees met with Defendant Robert Weber, the Director of the Building Department, over problems of low morale in the department tangentially related to this case. Petitioner took that opportunity to advise Weber of the acts of retaliation since he had refused to solicit money from contractors for the other three Defendants, Ron Lynn, The Assistant Director, and Assistant Managers, Gregory Franklin and Gary Houk. Weber responded to Petitioner's allegations, on November 4, 1998, by sending a list of alleged violations of department policy and possibly criminal acts by Petitioner, to the Clark County District Attorney. Weber then ordered investigations by the Building Department and Human Resources to begin into Petitioner's activities from when he was hired as an Inspector in 1989. On January 8, 1999, Defendants suspended Petitioner, in violation of a Collective Bargaining Agreement (CBA) in force at the time. The union refused

Petitioner's request to grieve the suspension, leaving him without a remedy against Defendants' actions.

While on suspension, Petitioner reported the wrongdoing by his supervisors of ordering him to solicit money for them and abusing him for his refusal to the Clark County Manager and the Board of Clark County Commissioners. Defendants fired Petitioner in April, 1999. Following termination, Defendant Lynn sent a letter, similar to that sent by Weber, to the District Attorney, re-alleging illegal acts by Petitioner which allegedly violate department policy. The District Attorney notified Petitioner that he was accused of falsifying records by entering inspections under the initials of another into department computers, and that the charges would be submitted to a grand jury. Petitioner was indicted on thirteen felony counts by the grand jury in May, 1999, accusing him of falsifying records in violation of Nevada Revised Statute (NRS) 239.320, Falsification of Records by a Public Officer.

Petitioner defended against the termination on denial of due process and on the basis that all acts of which he was accused were routine practices in the department used to get the daily workload of recording inspections accomplished and there was no policy against such acts. Petitioner successfully grieved the termination and denial of due process and was ordered to be reinstated with five month's back pay, by an unbiased hearing officer on November 5, 1999. Defendants refused to reinstate him and, instead, suspended him again in violation of the terms of the CBA. Again, the union refused to grieve the illegal suspension. In January, 2000, Defendants directed his involuntary transfer to the Department of Juvenile Justice Services of Defendant Clark County, where he is currently employed. The involuntary transfer was allegedly based on accusations that Petitioner had contributed to a hostile work environment. Petitioner's request to his union to grieve the involuntary transfer to afford him an opportunity to contest the basis for the transfer was denied.

The Criminal Indictment Was Flawed:

Petitioner was denied constitutional rights secured by the Fourth, Fifth and Fourteenth Amendments by the acts of defendants to secure the false indictment, cited here to support his claim of denial of substantive due process *ab initio* on which issue the District Court did not rule.

Defendants performed a warrantless search of Petitioner's desk and presented the search evidence to the grand jury to influence the outcome of the proceedings. A divided Supreme Court fund a right to privacy in one's office, but was unanimous in find an absolute right to privacy in one's desk and file cabinets. O'Conner v Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1986) "Any indictment following the presentation of such illegally obtained evidence is fruit of the poisonous tree and cannot be allowed. 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all'". Wong Sun v United States. 371 US 471, 9L.Ed.2d 441 (1963). Petitioner was ordered by Defendants to meet with and be interviewed by a District Attorney Investigator without advising him of his Weingarten rights or giving him a Miranda warning. That evidence was also used to procure the indictment. NRS 239.320 requires that to falsify records appertaining to his office, one must be an appointed or elected Public Officer. Petitioner was neither appointed nor elected, but was, in fact, hired by Defendants. The State of Nevada, prosecuting the Petitioner, had no evidence that he was either appointed or elected to his position. This was not presented to the grand jury panel. The grand jury indicted Petitioner May, 19, 1999.

On July 5, 2000, Petitioner filed a civil complaint against Defendants in the United States District Court for Nevada, Case Number CV-S-00-880-RLH (LRL), the Honorable

Judge Larry Hicks, presiding, for damages for violations of rights protected under 42 U.S.C. Section 1983, and for state law claims of defamation, intentional infliction of emotional distress, abuse of process, wrongful termination and civil conspiracy while acting in both their individual and official capacities.

The State sought and obtained a superseding indictment on, or about, April 23, 2002, on the same original charges from the May, 1999 indictment. Petitioner filed a petition for writ of habeas corpus. The State filed an opposition and a trial date was set on the criminal case.

The superseding indictment was pending trial in state court, when oral argument was heard by Judge Hicks, July 3, 2002. At oral argument, Petitioner presented evidence of the weakness in the criminal proceedings and made a rare prediction that the state could not prevail in that action. Judge Hicks rendered his decision September 24, 2002, granting summary judgment to Defendants on all counts.

On November 5, 2002, in the Eighth Judicial District Court, the Honorable Judge John McGroarty granted the petition for writ of habeas corpus and dismissed all charges in the superseding indictment, finding that Petitioner had not even violated department policy or Nevada state law. The criminal case was thereupon dismissed.

The Federal District Court did not have the evidence of that decision as substantial support for Petitioner's claims of wrongful termination publicly depriving him of his property and liberty right in his employment on pre-textual charges; causing him to be twice indicted on false charges with the use of perjured testimony to grand juries in support thereof. This was an overt and continual denial of his right to both procedural and substantive due process for more than three years while the criminal case was pending.

In affirming the reasoning of the District Court, the Panel of the Ninth Circuit, however, did have the State Court decision in evidence before it, presented for the sole purpose

to advise the Panel of the current state of the evidence. The Panel provide no basis supporting affirmation by which the Panel affirmed a decision which conflicts with Ninth Circuit ruling on very similar facts in Coszalter v City of Salem, Opinion No. 00-36097, (February 18, 2003, 9th Cir.), Clements v Airport Authority, Washoe County, 60 F.3d. 321 (9th Cir. 1995), Lockery v Kayfetz, 917 F. 2d 150 (9th Cir. 1991), Sierra Lake Reserve v The City of Rocklin, et al., 938 F. 2d. 951 (9th Cir. 1991, Lebbos v Judges of the Superior Court, Santa Clara County, 833 F. 2d.(9th Cir. 1989), Devereaux v Abbey, __ F. 3d. 2001, WL 1008128 (9th Cir. 2001) (en banc), and other Circuit rulings in Swann v City of Dallas 922 F. Supp.1184 (5th Cir. 1996), Thompson v Gallagher, 489 F. 2d. 443, (5th Cir. 1973) (substantive due process, at 446), "Substantive due process stems from our American ideals of fundamental fairness…[which] enmeshes the judiciary in substantive review of governmental action." Gutswiller v Fenik, 860 F. 2d.1317,1318. (6th Cir. 1988), (whether reasons expressed by decision-makers are arbitrary, capricious or trivial is a question of fact to be tried by the trier of fact.) Marks v City of Chesapeake, 993 F.2d.308, 313 (4th Cir. 1989) and this Court's decisions in *Village of* Willowbrook v Olech S. Ct. No. 98-1288 (February 23, 2000, U.S. Supreme Court.). ("class of one" for equal protection analysis.), Daniels v Williams, 474 U.S. 327 (1986) (substantive due process, oppressive government action) and (government conduct which "shocks the conscience"). As this Court found, "…needless to say, only this Court may overrule one of its precedents.". Thurston Motor Lines v Jordan K. Rand, 460 U.S. 533, 535. (1983).

The District Court found that Petitioner was not in any category of citizen protected against discrimination. Petitioner had argued that he had been denied equal protection by Defendants by singling him out for retaliation for refusing to have his inspectors solicit money for them

and reporting their abuse to higher authority. Petitioner argued that Defendants' conduct was such as to shock the conscience and was done in egregious bad faith and that no other employee had been so retaliated against, even though some of them also refused to carry out their orders to solicit. Petitioner was seen by Defendants as the ringleader and was the sole target of their abuse. This Court has said that there can be a "class of one" for equal protection analysis. Olech, supra. Also in this case, Petitioner fits into the protected class of those who refuse to violate the law, D'Angelo v Gardner 819 P. 2d. 206 (Nev. 1991), Ostrofe v H.S. Crocker Co., Inc. 670 F 3d.1378 (9th Cir. 1982), and whistle blowers retaliated against, in violation of public policy, N.R.S. 233.010, for reporting government misconduct. N.R.S. 281.621. See also Coszalter and Clements, supra.

The District Court also cited to precedent, then failed to apply the precedent finding, Citing to Wayment v Holmes, 912 P. 2d 816 (Nev. 1996) which provided that there is no immunity for state officers in Nevada for even discretionary actions, when such conduct was done in bad faith. The District Court found no bad faith in Defendants' depriving Petitioner of his property rights in his job acting under color of state law then using false testimony to two grand juries and alleging crimes to public media which were actually the routine practices of the department, in the process of firing Petitioner. "Essence of tortious discharge is wrongful, usually retaliatory, interruption of employment by means which are deemed contrary to public policy of Nevada" D'Angelo v Gardner, supra. Defendants interrupted Petitioner's employment for five months for reasons which are contrary to statutory public policy. N.R.S. 281.621.

Defendants did not refute the evidence presented by Petitioner in his Complaint or in his oral argument, as required by Rule 56 to support summary judgment. Even though Defendants had not carried their burden, Petitioner

fully opposed each motion in the papers incorporated in his opposition, particularly showing a constant denial of substantive due process beginning with constructive termination in January, 1998 and continuing through false criminal indictment until those charges were dismissed in November, 2002. "A non-moving party Plaintiff has no obligation to produce anything until the moving party has carried its initial burden of production." Nissan Fire v Fritz, Opinion 9816024, April 25, 2000 (9th Cir. 2000).

The CBA provides for a three-step hearing process to contest disciplinary actions. Petitioner proved a denial of procedural due process in having to present his Step 1 defense to wrongful termination to Lynn, the official who had wrongfully terminated him and who Petitioner had accused of abusing him in retaliation for refusing to solicit money and reporting the abuse to higher authority. Arnett v Kennedy, 416 U.S. 134. (1975). The Step 2 defense was presented to the Appointee of the County Manager who had conducted one of the three investigations which also found no facts on which to support termination. That official affirmed the termination in a further denial of due process as found in Step 3 by an unbiased Labor Relations Hearing Officer.

It is undisputed that Defendants illegally suspended Petitioner for five months in violation of the CBA and without a hearing on the basis of suspension, which the union refused to grieve, while they searched for something on which to fire him. When that failed, the record shows, they made up false charges which were thrown out at a Step Three hearing. They made false claims to the District Attorney and provided false testimony to two grand juries to cause Petitioner to be indicted and to suffer the emotional turmoil and fear of imprisonment for three and one half years until the charges were dismissed. This court has held that a person has a constitutional right not to be deprived based on

false evidence deliberately manufactured by his government. Pyle v. Kansas, 317 U.S. 213 (1941) , Mooney v Holohan, 924 U.S. 103 (1935) and the Ninth Circuit has affirmed those holdings, Devereaux v Abbey, F. 3d. WL 1008128 (9th Cir. 2001) (en banc), except in the instant case. Defendants conspired to force Petitioner to resign and just "go away" without a chance to reveal what caused his resignation, but he refused. Petitioner has claimed that each and every act of Defendants' abuse was done because he refused to violate the laws of Nevada for them and the record is devoid of evidence to the contrary. Evidence of Defendants depriving Petitioner of his property right for exercising his right of free speech, in violation of his right to substantive due process is extant in each of those acts and cannot be allowed *no matter how many procedural safeguards are provided.* Daniels, supra, Lebbos v Judges of Superior Court, Santa Clara County 883 F. 2d. 810, 818 (9th.Cir. 1989), Blaylock v Swinden 862 F. 2d.1352, 1354 (9th Cir. 1988). Thus, even if Petitioner had been afforded every due process procedural safe guard, a substantive due process violation would still exist under this Court and the Ninth Circuit's existing case law and was never addressed by the District Court.

REASONS FOR GRANTING THE WRIT:

The record in this case clearly shows that Defendants wrongfully deprived Petitioner of his property right in his employment for five months. Petitioner claimed and proved that his termination was for refusing to violate state law and for reporting Defendants' misdeeds to higher authority. Defendants have presented no other valid reason for firing him. Petitioner presented a bona fide constitutional claim precluding summary judgment, Perry v Sindermann, 408 U.S. 725. (1972). This Court noted also that although the claimant had not yet proved his case, "The District Court

foreclosed any opportunity to make such showing when it granted summary judgment." Id. The District Court found no deprivation because Petitioner eventually got restored to a job at the same level of pay to the one from which he was fired. That is not the law. The harm of a substantive due process violation occurs at the time of the wrongful government action. Sierra Lake Reserve v The City of Rocklin et. al. 938 F. 2d. 951, 958 (9th Cir. 1991).

Petitioner claimed that the pre-and post-termination procedures were flawed by having to present evidence in his defense to the same official who had fired him and whom he had accused of ethical violations. The District Court apparently and erroneously believed that the only claim possible under the Due Process Clause is a procedural due process claim. Such a belief completely ignores existing Ninth Circuit case law. A substantive due process violation exists when the government's action was clearly arbitrary and unreasonable and having no substantial relation to the public health, safety, morals, or general welfare. Sierra Lake Reserve, supra. Petitioner presented evidence, amply supported by documents and sworn affidavits of others similarly situated in the Clark County Building Department and his evidence was not received or reviewed by the District Court. There is a genuine issue of material fact if the evidence would permit a reasonable jury to return a verdict for the non-moving party. The District Court's granting of summary judgment for the Respondents/Defendants, while completely overlooking and ignoring Petitioner's valid, substantive due process claim substantially denied Petitioner any fair opportunity to redress the intentional harm directed against him.

CONCLUSION

Petitioner respectfully submits that the Ninth Circuit erred in affirming the reasoning of the District Court for Nevada because the District Court committed mistakes in its reasoning, as set forth below:

That Petitioner was not heard on his claim of deprivation of substantive due process by Defendants in instituting the proceedings in this case against him for exercising his right of free speech and reporting their misdeed to higher management; That sufficient evidence creating genuine issues of material fact on the issue of deprivation by Defendants of Petitioner's property and liberty rights by public and wrongful termination acting under color of state law, was before the District Court precluding summary judgment on Petitioner's Section 1983 claim;

Certiorari should be granted to review the appellate decisions in this case in light of the doctrine of *stare decisis* and to correct, by reversal and remand, the failure of both the District Court and the U.S. Court of Appeals for the Ninth Circuit to address Petitioner's valid substantive due process claim.

Therefore, Petitioner respectfully prays that this Court grant thispetition for writ of certiorari, reverse the decisions of the Ninth Circuit Court of Appeals and the District Court, hold that sufficient evidence was before the District Court to create genuine issues of material fact precluding summary judgment on Petitioner's claims and direct that the Ninth Circuit remand this case to District Court for trial on the

merits and for all other just and proper relief.

Dated this 30th day of April , 2004.

MARCUS D. McANALLY, JR.
Petitioner
Pro Se

APPENDIX

APPENDIX

A. Judgment and Order from the U.S. District Court District of Nevada, The Honorable Judge Larry R. Hicks September 24, 2002

B. Order of the U.S. Court of Appeals for the Ninth Circuit affirming District Court Order, December 13, 2003

C. Order of the U.S. Court of Appeals for the Ninth Circuit Denying Petition for Rehearing and Rehearing En Banc February 4, 2004

Appendix A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

MARCUS D. MCANALLY, JR	)	
	)	JUDGEMENT IN
Plaintiff	)	IN A CIVIL CASE
Vs	)	CV-S-00-0880-LRH
	)	(LRL)
CLARK COUNTY, ROBERT	)	
WEBER, RON LYNN, GREG	)	
FRANKLIN, AND GARY HOUK,	)	
Defendants,	)	

5 **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

X **Decision by Court.** This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is granted in favor of the Defendants on all claims.

LANCE S. WILSON,
Clerk
By:_____

Deputy Clerk
September 24, 2002

Appendix A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

***

MARCUS D. MCANALLY, JR., LRH- Plaintiff	)	CV-S-00-0880-LRL
V.	)	ORDER
CLARK COUNTY, A Nevada public entity; ROBERT WEBER, in his official capacity and individually, RON LYNN, in his official capacity and individually; GREG FRANKLIN, in his official capacity and individually; Gary HOUK, in his official capacity and individually, Defendants,	)	

Before this Court are four motions filed by Defendants: a Motion to Dismiss the Plaintiff's Punitive Damages Claims (22); a Motion to Dismiss Plaintiff's Intentional/Negligent Infliction of Emotional Distress Claims (#28); a Motion for Summary Judgment on Individual and Official Capacity Claims ("MSJ#1") (#32); and a Motion for Summary Judgment on Plaintiff's Wrongful Termination, 1983, Defamation, Abuse of Process, and Civil Conspiracy Claims ("MSJ#2") (#34). Oral argument was heard on July 3, 2002.

Appendix A

Because these motions, in total, have the effect of dismissing Plaintiff's entire claim, the Court addresses the issues as if presented by a single Motion for Summary Judgment.

I FACTUAL AND PROCEDURAL HISTORY

Plaintiff worked for the Clark County Building Department for approximately ten years, eventually holding the position of Supervising Building Inspector. Sometime in late 1998, Plaintiff alleges that three of the individual Defendants asked him and other co-workers to solicit donations from Las Vegas developers and contractors to benefit the International Conference of Building Officials (ICBO), its in-house education seminar called EDUCODE and an annual golf tournament. According to the Defendant, the requests were made in early morning staff meetings.

According to the Plaintiff, he considered the solicitation to be unethical and refused to engage in the solicitation. As a result, Plaintiff claims that he was targeted by the defendants in an attempt to remove him from his job. On December 18, 1998, Plaintiff met with Assistant County Manager Bonnie Rinaldi about the propriety of the request to solicit. On January 29, 1999, Ms. Rinaldi sent a letter to the plaintiff stating that there was no impropriety in the solicitation.

According to Plaintiff, he was wrongfully targeted for ethical misconduct involving the falsification of computer records. Plaintiff contends that he was merely finalizing inspections and making entries under the names of non-supervising inspectors, a practice not forbidden.

In November of 1998, Defendant Weber sent a "Request for Investigation" to the Clark County District Attorney's Office, outlining a number of possible violations of County and Department Standards. (Exhibit F, MSJ #2).

Appendix A

The District Attorney presented the charges to the Clark County Grand Jury which issued an indictment in May of 1999. Plaintiff argues that Greg Franklin, one of the nine witnesses before the Grand Jury, misled the grand jury on department policy on modification of computer records. The Defendants assert that Franklin testified that only supervisors could enter such modifications and that his grand jury testimony was, therefore consistent.

On February 8, 1999, Plaintiff and a co-worker filed a whistle blower complaint with Human Resources, alleging retaliation. On April 19, 1999, Earle White, Jr., a Labor Relations Hearing Officer, dismissed the complaint. (Exhibit F, MSJ #1).

In 1999, a disciplinary proceeding was initiated against Plaintiff by the County pursuant to the existing agreement between Clark County and the Nevada Service Employees Union (NSEU). (Exhibit E, MSJ #1) Prior to the termination of a Clark County employee, Article 11 of NSEU's contract requires the County to conduct a "Department Head Response" meeting once a grievance has been filed. *Id.* If the problem is not solved at the first level, the department head responds in writing to the grievance. *Id.* Defendant Lynn served as the fact finder at the Step-1 hearing while Defendant Franklin acted as the primary investigator. Following the Step-1 hearing, Defendant Lynn announced his decision to terminate Plaintiff's employment. Thereafter, Defendant Lynn sent a second memorandum to the District Attorney's office on March 23, 1999, containing a summation of the investigation's findings, including alleged violations of the County Code or policies, not limited to the contested computer records. (Exhibit D, MSJ #1).

The NSEU contract provides for the appeal of the Step-1 decision, entitled "County Manager Response." (Exhibit E, MSJ #1). Plaintiff filed an appeal of his

dismissal to the Clark County Human Resources Director. The NSEU contract then provides for a meeting similar to that in Step-1, whereby the parties are given an opportunity to attempto resolve the problem. *Id.* Upon conclusion of the meeting, the County Manager issued a decision on July 13, 1999, upholding the Defendant Lynn's decision to terminate the Plaintiff.

Plaintiff then exercised his right under the NSEU contract to appeal the Step-2 decision. *Id.* The NSEU contract provides for binding arbitration by a neutral hearings officer. *Id.* The NSEU contract provides a fairly elaborate scheme for choosing a neutral and independent hearings officer. *Id.* After choosing the officer and conducting the Step-3 arbitration, the hearings officer reinstated the Plaintiff.

On December 22, 1999, George Cotton, Manager of Equal Opportunity in the Human Resources Department sent a letter to Defendant Weber, recommending that Plaintiff not be returned to the Building Department, based on evidence acquired at the Step-3 hearing. (Exhibit B, Defendants' Reply to Opposition to Summary Judgment #2). The letter contained testimony regarding a hostile work environment created by the Plaintiff. Mr. Cotton recommended that Plaintiff retain his pay schedule benefits but not be allowed to supervise subordinate employees. *Id.* Plaintiff was then transferred to the Juvenile Court/Services division in mid-2000. Plaintiff claims the transfer constitutes a constructive discharge.

Plaintiff also alleges that the Defendants used the media to his detriment. The Las Vegas Review-Journal published four articles on Plaintiff's termination from the Building Department and ongoing criminal charges in the May 1st, 4th, June 3rd and June 4th editions in 1999. (Exhibit I, MSJ #2). Plaintiff contends that he has suffered physical

injury as a result of the media coverage and the criminal matter.

On July 13, 2000, Plaintiff filed the instant Complaint against defendants both in their official and individual capacities, alleging Defamation, Intentional/Negligent Infliction of Emotional Distress, Abuse of Process, Wrongful Termination, Civil Conspiracy, and various 1983 Civil Rights claims. With each claim for relief, Plaintiff requests punitive damages.

On September 28, 2001, four of the five named defendants filed a Motion to Dismiss the Plaintiff's Punitive Damages Claims (#22). Subsequently, the same four defendants filed a Motion to Dismiss Plaintiff's Intentional/Negligent Infliction of Emotional Distress Claims (#28) on November 15, 2001. On January 14, 2001, all five Defendants filed a Motion for Summary Judgment on Plaintiff's Wrongful Termination, 1983, Defamation, Abuse of Process, and Civil Conspiracy Claims (#34).

II. ANALYSIS

Defendants' move for Summary Judgment on Plaintiff's section 1983 Constitutional claims, Wrongful Termination claim, Abuse of Process claim, and Civil Conspiracy claim. Defendant's Motions to Dismiss Plaintiff's Intentional Infliction of Emotional Distress and Punitive Damages claim will also be treated as part of one Summary Judgment motion.

A. Standard of Review

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56©. In assessing a motion for summary judgment, the evidence, together with all inferences that can reasonably be drawn there from must be red in the light most favorable to the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154(9th Cier.2001)

The initial burden rests on the moving party to point out the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986. On those issues for which it bears the burden of proof, the moving party must make a showing that is ""sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party."" *Calerone v. United States,* 799 F.2d 254, 259 (6th Cir.1986). *See Idema v. Dreamworks, Inc.*, 162 F.Supp.2d 1162, 1141 (C.D.Cal.2001). For those issues where the moving party will not have the burden of proof at trial, the movant must point out to the court "That there is an absence of evidence to support the nonmoving party's case." *Catrett,* 477 U.S. at 325.

In responding to a summary judgment motion, the non-moving party may not rest upon the pleadings but must go beyond the pleadings and "present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). The non-moving party "must set forth specific facts showing there is a genuine issue for trial." Fed.R.Civ.P.56(e). A dispute is genuine if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* At 249. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient to establish a genuine dispute; there must be

evidence on which the jury could reasonably find for the plaintiff. *See id.* At 252.

B. Section 1983 Claims

Title 42, section 1983, of the United States Code provides a cause of action for persons deprived of federal rights under color of state law. *See Lebbos v. Judges of Super. Ct., Santa Clara County,* 883 F.2d 810, 817 (9th Cir. 1989) the threshold inquiry in a section 1983 claim is whether the plaintiff has identified a right cognizable under the statute. *See Graham v. Connor,* 490 U.S. 386 (1989). Section 1983 does not itself create substantive rights, "but merely provides a method for vindicating federal rights elsewhere conferred." *Id.* At 394 (quoting *Baker v. McCollan,* 443 U.S. 137, 144n.3 (1979).

Plaintiff's complaint contains a plethora of alleged constitutional claims, including the Right to Be Free From Illegal Employment Practices and Discrimination, the Right to Be Free From Personal Attacks, the Right to Equal Protection of the Laws, the Right of Free Speech and Association, the Right to Petition the Government for Redress; and the Right of Privacy. All of these claims are challenged by the Defendant in the MSJ #2. Plaintiff, however, fails to Oppose MSJ #2 as to his claims of the Right to Be Free From Personal Attacks, the Right to Free Speech and Association, and the Right to Petition the Government for Redress and as a result, summary judgment is granted in favor of the Defendants on those claims. Local Rule 7-2(d).

Accordingly, only three constitutional claims are left. Defendants argue that Plaintiff's Right to Privacy claim is of the state tort variety instead of the substantive due process variety. Plaintiff cites *PETA v. Bobby Berosini, ltd., 895*

P.2d 1269 (Nev. 1995) in his opposition (#38) to Defendants Summary Judgment #2; however, *PETA* is a state law case and does it deal with federally protected rights to privacy. Because section 1983 claims address violations of an individual's *federal* constitutional rights, a claim based upon a state law tort (the right to privacy not being an enumerated federal right) cannot serve as a basis for a 1983 action. Therefore, summary judgment is granted as to Plaintiff's Right to Privacy claim.

In order to state a viable equal protection claim under 1983, "a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Lee v. City of Los Angeles,* 250 F.3d 668, 686 (9th Cir.2001) (citations omitted). Here, Plaintiff admitted at oral argument that he is not a member of a recognized protected class. Consequently, Plaintiff failed to state an equal protection claim. *Lee,* 250 F.3d at 687.

The sole remaining federal constitutional claim is Plaintiff's purported Right to Be Free From Illegal Employment Practices and Discrimination. The Court reads this t be a due process claim, because Plaintiff cites to *Board of Regents v. Roth,* 408 U.S. 564 (1972) and *Perry v. Sindermann,* 408 U.S. 593 (1972), cases involving property and liberty interests in employment under the Due Process clause.

A due process claim under 1983 is not cognizable when a state's post-deprivation remedies are adequate to protect a plaintiff's procedural due process rights. *See Lake Nacimiento Ranch Co. V. County of San Luis Obispo,* 841 F.2d 872, 878 (9th Cir. 1988). Due process requires notice and an opportunity to be heard. *G & G Fire Sprinklers, Inc. v. Bradshaw,* 156 F.3d 893, 903 (9th Cir. 1998). Plaintiff was afforded pre-deprivation due process. *See Weinberg v.*

Whatcom County, 241 F.3d 746, 753 (9th Cir. 2001). In fact, Plaintiff's appeal of the Step-2 dismissal led to his reinstatement. Accordingly, Plaintiff fails to state a due process claim under 1983.

C. Supplemental State Claims

It is within the Court's discretion whether to hear supplemental state claims once it has dismissed all federal claims. *San Pedro Hotel Co., Inc. v. City of Los Angeles,* 159 F.3d 470, 478 (9th Cir. 1998). Addressing those claims, the Court grants summary judgment in favor of the Defendants as to al of the Plaintiff's supplemental state claims.

i. Wrongful Termination

Defendants request Summary Judgment on Plaintiff's Wrongful Termination claim. Defendants argue that Plaintiff is still employed and his termination/transfer does not violate the public policy exceptions to Nevada's at-win doctrine.

There is a presumption in Nevada that all employees are at-will employees. *See American Bank Stationary v. Farmer,* 799 P.2d 1100, 1101-2 (Nev. 1990). An employee may rebut the presumption "by proving by a preponderance of the evidence that there was an express or implied contract of employment that provided for termination only for cause." *Id.* Plaintiff does have such a contract, namely, the contract between Clark County and the Nevada Service Employees Union. Plaintiff's NSEU Contract (Exhibit E, MSJ #2) defines discipline as "an employee's suspension, demotion or involuntary termination from County service." And section 2, paragraph 5, states that "no employee who has satisfactorily completed probation may be demoted,

suspended or terminated without just cause." Because Plaintiff is entitled to the protections contained in his NSEU contract, the Court finds that Plaintiff is not an at-will employee.

Because Plaintiff is not an at-will employee, his wrongful discharge claim can be categorized as either a tortuous discharge or a bad faith discharge. With respect to tortuous discharge, an employee cannot be terminated for reasons that violate the public policy of Nevada. *See Wayment v. Holmes,* 912 P.2d 816 (Nev. 1996). These public policy exceptions include those found in NRS 233.010 (race, religious, sex, etc.), and those enumerated in Nevada case law. Such violations of public policy include discharges of an employee for 1) refusing to violate the law; 2) refusing to work under conditions unreasonably dangerous to the employee; or 3) accepting jury duty. *See D'Angelo v. Gardner,* 819 P.2d 206 (Nev. 1991). Termination of an employee for having filed a workman's compensation claim would constitute a violation as well. *See Hansen v. Harrah's* 675 P2.d 394 (Nev. 1984).

A bad faith discharge tort on the other hand is committed "when an employer, acting in bad faith, discharges an employee who has established contractual rights of continued employment and who has developed a relationship of trust, reliance and dependency with the employer." *See D'Angelo,* 819 P2.d at 212. "Consequently, a bad faith discharge tort cannot be committed against an at-will employee as can a tortuous discharge." *See id.* At 211-12.

In this case, Plaintiff's wrongful termination claim does not fall within any recognized public policy exceptions in NRS 233.010(1) or in any case law. Consequently, Defendants are not liable for tortuous discharge. Plaintiff cannot avail himself of the bad faith tort either, as thee is

nothing in the record that suggests the type of bad faith on the part of the Defendants necessary to maintain the claim. Plaintiff has shown no evidence that Defendants acted to withhold proper process in the two pre-termination hearings nor is there evidence to suggest something sinister in Plaintiff's transfer to Juvenile Services, especially in light of the Cotton letter. Instead, the transfer appears to be based upon Plaintiff's own doing and unrelated to his claims against the named Defendants. As a result, the Court grants Summary Judgment in favor of the Defendants, as to the wrongful discharge claim.

ii. Defamation

Defendants also ask for Summary Judgment on Plaintiff's defamation claim. To prevail on a defamation claim, a party must show publication of a false statement of fact. *See Wellman v. Fox,* 825 P.2d 208 (Nev. 1992); *Lubin v. Kunin,* 17 P.3d 422, 425 (Nev. 2001) "It is within the province of the court to determine if a statement is capable of a defamatory construction. If susceptible of different constructions, one of which is defamatory, resolution of the ambiguity is a question of fact for the jury." *Branda v. Sanford,* 637 P.2d 1223, 1225-6 (Nev. 1981) (citations omitted). A statement is defamatory when, "such charges would tend to lower the subject in the estimation of the community and to excite derogatory opinions against him and to hold him in contempt." *Las Vegas Sun. v. Franklin,* 329 P.2d 867, 869 (Nev. 1958).

The Plaintiff has not identified any specific statements he contends were defamatory. The Court therefore assumes, based on the four newspaper articles supplied by the parties in the exhibits, that Plaintiff's claim stems from statements made by various Defendants to

reporters for the Las Vegas Sun or the Las Vegas Review-Journal. (Exhibit I, Defendant's Summary Judgment Motion #1). However, the statements found in the record to not appear to be false nor are they susceptible to a defamatory construction. In fact, in articles dated May 1, May 4 and June 3 of 1999, the Las Vegas Review Journal reported the Defendants as refusing to comment on the pending action. Other than these articles, the Plaintiff has cited no other statements attributable to the Defendants that can support a defamatory construction. Therefore, as to the Defamation claim, Summary Judgment is granted in favor of Defendants.

iv. *Abuse of Process*

Defendants next challenge Plaintiff's Abuse of Process claim. Plaintiff's claim is based on Defendant Weber's referral of Plaintiff's activities to the district Attorney's office, which later secured a grand jury indictment against him.[2] The two elements required to establish the tort of abuse of process in Nevada are: "(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." *Kovacs v. Acosta,* 787 P.2d 368 (Nev. 1990). Unlike the tort of malicious prosecution, the abuse of process tort can arise from the institution of either a criminal or civil proceeding. *LaMantia v. Rendisi,* 38 P.3d 877 (Nev. 2002).

The Nevada Supreme Court analyzed the abuse of process tort most recently in38 P.3d 877 (Nev. 2002). There Televiev, Inc., a Nevada corporation brought a civil suit against LaMantia for *inter alia,* breach of contract, fraud, and conspiracy. . *See id.* At 878. Subsequently, the district court granted summary judgment in favor of LaMantia. *See id.* Thereafter, LaMantia sued Televiev and it's president,

Redisi for abuse of process and malicious prosecution. *See id.* The district court granted summary judgment in favor of Redisi, which was later upheld by the Nevada Supreme Court. See *id.* At 880. In doing so, the Nevada Supreme Court found that LaMantia had failed to present specific facts that Redisi had an ulterior purpose in the underlying breach of contract suit other than resolving the legal dispute with LaMantia and that Redisi willfully and improperly used the legal process to accomplish that ulterior purpose. *See id.* Further, the curt noted that LaMantia had presented no evidence that Redisi "actively pressured or directed Teleview to improperly use the legal process to proceed against LaMantia." *Id.*

The same is true in this case. The Plaintiff has failed to show that the Defendants maintained an ulterior purpose in referring the matter to the Clark County District Attorney's office, nor has he shown any evidence of the Defendant's actively pressuring the District Attorney's office to prosecute this matter. Without additional evidence, simply referring the matter to the District Attorney's office does not constitute abuse of process. Furthermore, the Grand Jury is an independent fact finder and reaches a decision concerning an indictment based on the evidence presented to it. While this Court, when reviewing a summary judgment motion, construes the pleadings and proof in the light most favorable to the non-moving party, the Plaintiff is not entitled to build his case on the "gossamer threads of whimsy, speculation, and conjecture." (1st Cir. 1962). Therefore, summary judgment is granted in favor of the Defendants with respect to Plaintiff's abuse of process claim.

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2 From the record before the Court, it appears that those claims are still pending in state court.

Appendix A

v. Civil Conspiracy

Finally, the Defendants challenge Plaintiff's Civil Conspiracy claim, on the grounds that members of a single agency cannot conspire as a matter of law. Defendants are correct as to the official capacity claims. *See Carmen v. San Francisco Unified Sch. Dist.*, 982 F.Supp.1396, 1404 (N.D. Cal.1997);*Laxalt v. McClatchy,* 622 F.Supp.737 (D. Nev. 1985). However, Plaintiff's claims against the Defendants include individual capacity claims as well.

To state a cause of action of Civil Conspiracy, the Plaintiff must prove 1) the formation and operation of the conspiracy; 2) the wrongful act or acts done pursuant thereto; and 3) the damage resulting from such act or acts. *See Ungaro v. Desert Palace, Inc.*, 732 F.supp.1522, 1532 n.3 (D. Nev. 1989) (citations omitted). Plaintiff's entire cases rests on his allegation of a conspiracy between the defendants, at least in their individual capacities, to remove Plaintiff from his job. However, Defendants' ability to achieve this end was limited t best. Once the process reached the post-termination employment hearing, Defendants' had no control over whether Plaintiff would be reinstated. Here, a reinstatement did occur. It appears that the Plaintiff was transferred by the Department of Human Resources due to conduct unrelated to the individual Defendants; namely, the evidence of sexual harassment and hostile work environment which was presented to the Human Resources Department. Plaintiff has failed to present sufficient evidence to withstand Defendants' request for summary judgment. Therefore, summary judgment is granted in Defendants favor with respect to the Civil Conspiracy claim.

Appendix A

D. Individual Capacity State Tort Claims

Defendants claim they are protected against all state law torts under Nev. Rev. Stat. 41.032. State immunity is a defense to claims
made under state law. *See Ortega v. Reyna,* 953 P.2d 18 (Nev. 1998).

The state Of Nevada waives its immunity under Nev. Rev. Stat. 41.031 but retains immunity under Nev. Rev. Stat 41.032 for officials exercising discretion. A "discretionary act" is one that requires "exercise of personal deliberation, decision and judgment." *Travelers Hotel v. City of Reno,* 741 P.2d 1353, 1354 (Nev.1987). If, however, Defendants' actions were taken in bad faith, they would "no longer be discretionary and subject it immunity." *Wayment v. Holmes,* 912 P.2d 816 (Nev. 1996) (citations omitted). Essentially, section 41.031 waives Nevada's sovereign immunity for torts committed by its employees, reserves immunity for employees acting within the discretion of their position, but refuses indemnification for employees acting outside the scope of the public duties under section 41.03475.

The question whether the Defendants were acting within the scope of their duties or in bad faith is largely a factual one. However, Plaintiff has not provided sufficient evidence to support his claims against Defendants either in their official or individual capacities. Therefore, Summary Judgment is granted as to all state law claims against the Defendants in both their official and individual capacities.

It is important to note that Defendant Greg Franklin's name was missing from the Caption of all Defendant's collective motions but MSJ #1. The Court finds that there is no evidence tending to show that Defendant Franklin was not at all times acting within the scope of his employment and within the discretion afforded him by his position.

Appendix A

E. Intentional and Negligent Infliction of Emotional Distress

Defendants argue that 1) the plaintiff fails to present any evidence of the type of behavior that could support an emotional distress claim; 2) the plaintiff fails to present any evidence of physical impact related to the alleged emotional distress; and 3) the plaintiff fails to present any evidence that Defendants actions caused the alleged emotional distress. *See Star v. Rabello,* 625 P.2d 90 (Nev. 1981).

Whether the evidence of Plaintiff's distress is sufficient to allow his claim to advance to the trier of fact and whether defendant's conduct may reasonably be regarded as so extreme and outrageous to permit recovery are questions for the Court to answer. *See Alam v. Reno Hilton Corp.,* 819 F. Supp.905 (D. Nev. 1993). The Plaintiff must suffer sever emotion distress of a kind that no reasonable person could be expected to endure. *See id.* At 911. "Moreover, the less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from emotional distress." *Hirschorn v. Sizzler Restaurants* International, *Inc.,* 913 F.Supp. 1393, 1401 (D. Nev. 1995).

Among other things, Defendants challenge the sufficiency of the evidence of Plaintiff's alleged injuries which included *inter alia,* embarrassment, loss of sleep, irritability and weight gain. Plaintiff admits in his deposition that he has not sought medical attention. (Exhibit A, Motion to Dismiss Intentional Infliction of Emotional Distress Claims). The injuries that Plaintiff cites, without more, do not constitute the type of injuries necessary to sustain an emotional distress claim. *See Hirschorn,* 913 F. Supp. at 1401; *Ramirez v. City of Reno,* 925 F. Supp.682 (D.Nev.1996); *Alam,* 819 F.Supp. at 911 (Plaintiff's feelings

of inferiority, headaches, irritability, and loss of ten pounds were insufficient t amount to severe emotional distress.)

Because Plaintiff's alleged injuries are insufficient to sustain an emotional distress claim, there is no reason for further analysis. Summary judgment is granted in favor of Defendants as to Plaintiff's Intentional and Negligent Infliction of Emotional Distress Claims.

F. Punitive Damages Claims:

Plaintiff requests punitive damages for each of his respective

claims. Punitive damages are not available with respect to any f his official capacity claims. *See NRS 41.035; City of Newport v. Fact Concerts,* 435 U.S. 247, 271 (1981); *Mitchell v. Dupnik,* 75 F.3d 517, 527 (9th Cir. 1996). The Court need not rule on the Motion to Dismiss Punitives, as the issue is now moot because summary judgment is granted in favor of the Defendants on all claims.

IT IS THEREFORE ORDERED that Defendants' Motions for Summary Judgment (#32, 34) on Plaintiff's Wrongful Termination, section 1983, Defamation, Abuse of Process, and Civil Conspiracy claims are GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Intentional and Negligent Infliction of Emotional Distress claims (#28) is GRANTED

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Punitive Damages claims (#22) is Granted.

Appendix A

DATED this 24th day of September, 2002.

LARRY R. HICKS
United States District Judge

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCUS D. McANALLY, JR.,	No. 02-17160
Plaintiff – Appellant,	C.C. No. CV-00-00880-LRH

MEMORANDUM*
CLARK COUNTY; GREG FRANKLIN; GARY HOUK; RON LYNN; ROBERT WEBER,

Defendants – Appellees

Appeal from the United States District Court
For the District of Nevada
Larry R. Hicks, District Judge, Presiding

Submitted December 4, 2003**
San Francisco, California

Before: BRIGHT, D.W. NELSON, AND RYMER, PAMELA ANN,
Circuit Judges.

Appendix B

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Appellant Marcus McAnally, Jr. appeals the district court's grant of defendants' motions for summary judgment on McAnally's claim for deprivation of constitutional rights pursuant to 41 U.S.C. 1983 and his state law tort claims. We affirm based on the reasoning of the district court and further ld that the district court did not abuse its discretion in asserting supplemental jurisdiction over McAnally's state law claims. *See Acri v. Varian Assoc., Inc.,* 114 F.3d999, 1000(9th Cir. 1997); *Schneider v. TRW, Inc.,* 938 F.2d 986, 994 (9th Cir. 1991).

The judgment of the district court is AFFIRMED.

Appendix C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARCUS D. McANALLY, JR.,	No. 02-17160
Plaintiff – Appellant,	D.C. No. CV-00-00880-LRH
v.	ORDER
CLARK COUNTY; GREG FRANKLIN; GARY HOUK; RON LYNN; ROBERT WEBER,	
Defendants – Appellees.	

Before: BRIGHT, D.W. NELSON, AND RYMER, PAMELA ANN,
Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing en banc. Judges Bright and. D. Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P.35)

The petition for rehearing and the petition for rehearing en banc are denied.